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7 **IN THE UNITED STATES DISTRICT COURT**
8 **FOR THE DISTRICT OF ARIZONA**
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10 Ernest Joseph Atencio, et al.,
11 Plaintiffs,
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13 v.
14 Joseph M. Arpaio, et al.,
15 Defendants.

No. CV-12-02376-PHX-PGR

ORDER

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17 The Court has before it City Defendants' Motion to Stay Proceedings Pending
18 Appeal and Request for Clarification as to the State Law Claim Only (Doc. 447), Sheriff
19 Arpaio's Separate Motion to Clarify/Reconsider Ruling that Arpaio can be Responsible
20 in his Individual Capacity for the Medical Defendants' Conduct (Doc. 448), and
21 Plaintiffs' Motion to Certify Appeal as Frivolous (Doc. 454). The Court also has before
22 it the various joinders in the pending motions and the responses and replies to the
23 motions (*see* Doc. 448, 449, 474, 478, 499, 500). The Court will grant in part and deny
24 in part the Motion to Certify Appeal as Frivolous (Doc. 454). The Court will grant City
25 Defendant's Motion to Stay Proceedings Pending Appeal and Request for Clarification
26 (Doc. 447). The Court will deny Sheriff Arpaio's Motion to Clarify/Reconsider Ruling
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1 (Doc. 448).

2 **A. Plaintiffs’ Motion to Certify Appeal as Frivolous (Doc. 454).**

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4 Defendants have filed notices of appeal from this Court’s denial of summary
5 judgment on the issue of qualified immunity. Plaintiffs move to certify those appeals as
6 frivolous. The Court will grant in part and deny in part Plaintiffs’ motion.

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8 An order denying a motion for summary judgment on the question of qualified
9 immunity generally is immediately appealable. *See Plumhoff v. Rickard*, 134 S. Ct. 2012,
10 2018 (2014). This immediate appealability is “because such orders conclusively
11 determine whether the defendant is entitled to immunity from suit,” an issue that “is both
12 important and completely separate from the merits of the action,” and also “could not be
13 effectively reviewed on appeal from a final judgment because by that time the immunity
14 from standing trial will have been irretrievably lost.” *Id.* at 2019.

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17 However, not all orders denying summary judgment on the issue of qualified
18 immunity are immediately appealable. “[A] defendant, entitled to invoke a qualified
19 immunity defense, may not appeal a district court’s summary judgment order insofar as
20 that order determines whether or not the pretrial record sets forth a ‘genuine’ issue of fact
21 for trial.” *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995). On the other hand, “summary
22 judgment determinations *are* appealable when they resolve a dispute concerning an
23 ‘abstract issu[e] of law’ relating to qualified immunity – typically, the issue whether the
24 federal right allegedly infringed was ‘clearly established.’” *Behrens v. Pelletier*, 516
25 U.S. 299, 313 (1996) (emphasis and alteration in original, citation omitted).

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28 As the Ninth Circuit explained, “both the denial of a defendant’s motion as well as

1 a ruling by the trial judge that ‘if the facts are as asserted by the plaintiff, the defendant is
2 not immune,’” may be immediately appealed. *Mueller v. Aufer*, 576 F.3d 979, 987 (9th
3 Cir. 2009). However, a challenge to the “*sufficiency* of the evidence in support of the
4 factual claims made by the parties” is not immediately appealable. *Kennedy v. City of*
5 *Ridgefield*, 439 F.3d 1055, 1060 (9th Cir. 2006) (emphasis added); *see Wilkins v. City of*
6 *Oakland*, 350 F.3d 949, 951 (9th Cir. 2003) (“It is well-established that ‘an appellate court
7 lacks jurisdiction over an interlocutory appeal challenging the sufficiency of the evidence
8 supporting the trial court’s conclusion that an issue of fact exists.’” (Citation omitted.)).

11 1. City Defendants

12 a. Escort to linescan room

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14 As to the escort of Atencio from the holding cell to the linescan room, City
15 Defendants contend that whether Defendant Hanlon is entitled to qualified immunity is a
16 purely legal issue because there is a video of the event, and that this video demonstrates
17 that Hanlon merely had his hands on Atencio’s back and shoulders to guide him and did
18 not manipulate Atencio’s hands, or in any way cause Atencio to bend over. However, the
19 quality of the video provided to the Court, which recorded most but not all of the escort,
20 was insufficiently clear for the Court to rule out the version of the escort put forward by
21 Plaintiffs, particularly in light of the testimony of Matthew Laymen, who indicated that
22 the officers escorted Atencio by leading him with his hands and arms bent in what looked
23 like a very painful position and that Atencio’s statements indicated that the officers were
24 hurting him. Further, the video demonstrates that Atencio was neither aggressive nor
25 resistant during the escort, and other evidence indicates that Atencio was “humorous,”

1 “jovial,” and non-aggressive. Moreover, viewing the evidence in the light most favorable
2 to Plaintiffs, this alleged use of force during the escort was merely a step in the series of
3 events that occurred in the linescan room and the safe cell that led to Atencio’s death.
4 Indeed, the subsequent events in the linescan room and safe cell may well have never
5 happened but for the alleged use of force during the escort.
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8 As the Court found in denying summary judgment, there is a genuine factual
9 dispute as to what actually occurred during the escort to the linescan room and what
10 Hanlon knew at the time. Under Plaintiffs’ versions of the facts, Hanlon would not be
11 entitled to qualified immunity because his use of force under these circumstances would
12 be objectively unreasonable. *See Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015)
13 (“a pretrial detainee must show only that the force purposely or knowingly used against
14 him was objectively unreasonable” with such objective unreasonableness turning “on the
15 ‘facts and circumstances of each particular case,’” and “from the perspective of a
16 reasonable officer on the scene, including what the officer knew at the time, not with the
17 20/20 vision of hindsight”).
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21 This genuine factual dispute does not render an appeal from the Court’s denial of
22 summary judgment frivolous in its entirety. To the extent City Defendants seek to
23 challenge on appeal the Court’s determination that, viewing the evidence in the light most
24 favorable to Plaintiffs, Hanlon would not be entitled to qualified immunity based on his
25 conduct escorting Atencio to the linescan room, appellate jurisdiction exists and thus,
26 such an appeal would not be frivolous. *See Mueller*, 576 F.3d at 987 (“a ruling by the
27 trial judge that ‘if the facts are as asserted by the plaintiff, the defendant is not immune’”
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1 qualifies for an interlocutory appeal); *Kennedy*, 439 F.3d at 1060 (appellate jurisdiction
2 exists over question of whether, viewing issues of fact in favor of plaintiff, officer's
3 actions were objectively unreasonable).
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5 However, to the extent City Defendants seek to challenge on appeal the *sufficiency*
6 of the evidence to support Plaintiffs' version of the facts, and the Court's determination
7 that a genuine issue of fact exists, such an appeal would be frivolous. *See Kennedy*, 439
8 F.3d at 1060 (no appellate jurisdiction over interlocutory appeal challenging sufficiency
9 of the evidence supporting factual claims made by the parties); *Wilkins*, 350 F.3d at 951
10 (no appellate jurisdiction over interlocutory appeal challenging sufficiency of evidence
11 supporting district court's determination an issue of fact exists).
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14 b. Linescan room

15 As to the use of force in the linescan room, City Defendants again rely on the
16 presence of a video recording of the event and contend that the question of qualified
17 immunity is thus a purely legal issue. However, viewed in the light most favorable to
18 Plaintiffs, this video recording, when combined with other evidence in the record,
19 demonstrates that Atencio was not being combative, violent, aggressive, or threatening
20 towards anyone; that Atencio's demeanor was "humorous," "jovial," and non-aggressive;
21 that the officers, including Hanlon and French, knew that Atencio was in a state of
22 psychosis and confusion, and was having trouble following directions; that Atencio's
23 response to the command to remove his shoes by removing one shoe then asking the
24 officer to remove his other shoe (or telling the officer to remove his own shoe), pointing
25 at Hanlon, and crossing his arms over his chest were a result of Atencio's psychosis,
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1 confusion, and difficulty following directions; that if Atencio had been given time and
2 opportunity to understand and follow the direction to remove his other shoe, the use of
3 force may not have been needed; and that Atencio was not posing a threat or a risk of
4 harm to anyone. Under this view of the facts, it was objectively unreasonable for an
5 officer to immediately grab and engage in a physical struggle with Atencio and take
6 Atencio to the ground through the use of a choke hold/carotid hold. *See Kingsley*, 135 S.
7 Ct. at 2473.

10 The officers clearly dispute Plaintiffs' version of the facts and argue that the
11 dispute is purely legal, citing *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), and *Scott v.*
12 *Harris*, 550 U.S. 372 (2007). However, the videos in both *Plumhoff* and *Scott* not only
13 contradicted the plaintiffs' versions of the events, but also made it clear that the suspect
14 was putting other civilians and officers at risk, and that the officers' conduct in using
15 force to end that risk was reasonable. *See Plumhoff*, 134 S. Ct. at 2021-22; *Scott*, 550
16 U.S. at 379-380, 386. In contrast, here the video neither contradicts the version of the
17 facts put forward by Plaintiffs nor makes it clear that Atencio was creating a threat or a
18 risk to the officers or others in the jail. The existence of the video in the present case
19 does not, therefore, transform the factual disputes into a purely legal question, and these
20 factual disputes preclude a grant of summary judgment on the issue of qualified
21 immunity.

22 The genuine factual disputes do not, however, render an appeal from the Court's
23 denial of summary judgment frivolous in its entirety. To the extent City Defendants seek
24 to challenge on appeal the Court's determination that, viewing the evidence in the light
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1 most favorable to Plaintiffs, neither Hanlon nor French would be entitled to qualified
2 immunity based on their conduct in the linescan room, appellate jurisdiction exists and
3 thus, such an appeal would not be frivolous. *See Mueller*, 576 F.3d at 987; *Kennedy*, 439
4 F.3d at 1060. On the other hand, to the extent City Defendants seek to challenge on
5 appeal the *sufficiency* of the evidence to support Plaintiffs' version of the facts, and the
6 Court's determination that a genuine issue of fact exists, such an appeal would be
7 frivolous. *See Kennedy*, 439 F.3d at 1060; *Wilkins*, 350 F.3d at 951.

10 As to the uses of force that occurred after Hanlon and French were no longer
11 physically involved, e.g., the facial strikes by Hatton and the Taser deployment by
12 Officer Weiers, the Court denied summary judgment on the issue of qualified immunity
13 because there was a genuine factual dispute as to whether Hanlon and French were
14 integral participants in that use of force. To the extent City Defendants seek to challenge
15 on appeal whether the integral participant theory can be applied under the circumstances
16 of this case and, if so, whether, viewing the evidence in the light most favorable to
17 Plaintiffs, City Defendants are entitled to qualified immunity, such an appeal would not
18 be frivolous. *See Behrens*, 516 U.S. at 313 (summary judgment decisions appealable
19 when they resolve dispute about abstract issue of law); *Mueller*, 576 F.3d at 987;
20 *Kennedy*, 439 F.3d at 1060. On the other hand, to the extent City Defendants seek to
21 challenge on appeal the *sufficiency* of the evidence to support Plaintiffs' version of the
22 facts and the Court's determination that a genuine issue of fact exists regarding whether
23 Hanlon and French were integral participants, such an appeal would be frivolous. *See*
24 *Kennedy*, 439 F.3d at 1060; *Wilkins*, 350 F.3d at 951.

1 2. Arpaio Defendants

2 Arpaio defendants were participants in the struggle with Atencio, and assisted with
3 taking Atencio to the floor and holding him down on the floor in a “dog pile” in the
4 linescan room while Hatton delivered strikes to Atencio’s facial region and Weiers used
5 the Taser on Atencio. Arpaio Defendants also were participants in holding Atencio down
6 in the safe cell while Hatton delivered a knee strike to Atencio. In addition to that noted
7 above, the evidence, viewed in the light most favorable to Plaintiffs, demonstrates that
8 once the officers physically engaged with Atencio, Atencio passively resisted; that after
9 Atencio was taken to the floor, Arpaio Defendants participated in a “dog pile” to hold
10 Atencio down while Defendant Weiers tased Atencio and Defendant Hatton administered
11 numerous strikes to Atencio’s face; that once Atencio was transferred to the safe cell,
12 Arpaio Defendants held him down while Defendant Hatton delivered a knee strike to
13 Atencio’s back; and that at no point was Atencio actively aggressive or violent towards
14 the officers or anyone else. Under this view of the facts, it was objectively unreasonable
15 for Arpaio Defendants to hold Atencio down while officers engaged in the facial strikes
16 and knee strike, and tased Atencio. *See Kingsley*, 135 S. Ct. at 2473.

17 Arpaio Defendants dispute this view of the facts, and set forth their own version of
18 the facts. Their version does not, however, view the facts in the light most favorable to
19 Plaintiffs and, further, ignores many of the disputed facts relied upon by the Court in
20 denying summary judgment.

21 There are genuine factual disputes as to what exactly happened in the linescan
22 room and the safe cell, including the conduct of Atencio and the conduct of Arpaio
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1 Defendants and what they knew at the time of the use of force. These genuine factual
2 disputes preclude summary judgment on the issue of qualified immunity but do not
3 render an appeal from the Court's denial of summary judgment on qualified immunity
4 frivolous in its entirety. To the contrary, to the extent Arpaio Defendants seek to
5 challenge on appeal the Court's determination that, viewing the evidence in the light most
6 favorable to Plaintiffs, Arpaio Defendants would not be entitled to qualified immunity,
7 appellate jurisdiction exists and thus, such an appeal would not be frivolous. *See*
8 *Mueller*, 576 F.3d at 987; *Kennedy*, 439 F.3d at 1060. Similarly, to the extent Arpaio
9 Defendants seek to challenge on appeal whether the integral participant theory and/or
10 duty to intervene can be applied under the circumstances of this case, such an appeal
11 would not be frivolous. *See Behrens*, 516 U.S. at 313 (summary judgment decisions
12 appealable when they resolve dispute about abstract issue of law); *Mueller*, 576 F.3d at
13 987; *Kennedy*, 439 F.3d at 1060.

14 However, to the extent Arpaio Defendants seek to challenge on appeal the
15 *sufficiency* of the evidence to support Plaintiffs' version of the facts, and the Court's
16 determination that a genuine issue of fact exists, such an appeal would be frivolous. *See*
17 *Kennedy*, 439 F.3d at 1060; *Wilkins*, 350 F.3d at 951.

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23 3. Hatton Defendants¹

24 There is a genuine factual dispute regarding what actually occurred prior to
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27 ¹ Hatton notes that Plaintiffs' motion does not explicitly include Hatton
28 Defendants' appeal, likely because Plaintiffs filed their motion on the same day that
Hatton Defendants filed their notice of appeal (*see* Doc. 453, 454).

1 Hatton's delivery of the face and knee strikes. Although Hatton claimed he delivered the
 2 strikes in self-defense (at least as to the facial strikes), other evidence indicates that
 3 Atencio was helpless and defenseless at the time Hatton made these strikes and that the
 4 strikes were unreasonable, unjustifiable, and excessive. This genuine factual dispute
 5 precludes summary judgment on the issue of qualified immunity. The factual dispute
 6 does not, however, render an appeal regarding the denial of summary judgment on
 7 qualified immunity frivolous in its entirety. To the contrary, to the extent Hatton seeks to
 8 challenge on appeal the Court's determination that, viewing the evidence in the light most
 9 favorable to Plaintiffs, Hatton would not be entitled to qualified immunity, appellate
 10 jurisdiction exists and thus, such an appeal would not be frivolous. *See Mueller*, 576
 11 F.3d at 987; *Kennedy*, 439 F.3d at 1060. However, to the extent Hatton seeks to
 12 challenge on appeal the *sufficiency* of the evidence to support Plaintiffs' version of the
 13 facts and the Court's determination that a genuine issue of fact exists, such an appeal
 14 would be frivolous. *See Kennedy*, 439 F.3d at 1060; *Wilkins*, 350 F.3d at 951.

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 19 **B. City Defendants' Motion to Stay Proceedings Pending Appeal and Request**
 20 **for Clarification as to State Law Claim (Doc. 447).**

21 1. Motion to Stay

22 In the Ninth Circuit, an interlocutory appeal of the denial of qualified immunity
 23 divests the district court of jurisdiction to proceed with trial unless the trial court has
 24 certified the appeal as frivolous or waived. *See Chuman v. Wright*, 960 F.2d 104, 105 (9th
 25 Cir. 1992). As discussed above, the Court will deny in large part Plaintiffs' request to
 26 certify Defendants' appeals as frivolous. Thus, the interlocutory appeal filed by
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1 Defendants divests the Court of jurisdiction over Plaintiffs' federal constitutional claims.

2 City Defendants move to stay the proceedings as to the remaining state law
3 wrongful death claim pending the outcome of the appeal. Plaintiffs object to the
4 requested stay.
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6 Failure to stay the proceedings pending the outcome of the appeal could result in
7 two separate trials, inconsistent results, the waste of judicial resources, and increased
8 expense to the parties. Moreover, the facts relating to Plaintiffs' state law wrongful death
9 claim are inextricably intertwined with the facts relating to their federal constitutional
10 claims as demonstrated by the First Amended Complaint, which alleges the same
11 wrongful conduct of Defendants violated both state law and § 1983.
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14 On the other hand, the Court recognizes that a stay of these proceedings, and the
15 resulting delay in resolution of Plaintiffs' claims, will injure Plaintiffs, and that there is a
16 risk that witness memories will fade. However, discovery has been completed in this
17 action, with only final pretrial proceedings and trial remaining. This posture significantly
18 decreases the risk of fading memories impacting the outcome of this litigation.
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20 The Court finds that, under the circumstances of this case, a stay of the
21 proceedings is appropriate. The Court will thus exercise its discretion and stay these
22 proceedings pending the outcome of the appeal.
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24 2. Motion for Clarification
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26 City Defendants seek clarification of the Court's Order regarding the denial of
27 summary judgment on the state law claim against them. City Defendants argued in their
28 motion for summary judgment (Doc. 299) that their use of force was reasonable and that

1 they were therefore immune from liability on the state law claim. The Court did not, in its
 2 Order (Doc. 442) denying summary judgment, separately discuss whether City
 3 Defendants were entitled to summary judgment on the state law claim. However, as
 4 discussed above and in the Court's Order (Doc. 442), the evidence viewed in the light
 5 most favorable to Plaintiffs demonstrates that Hanlon's and French's uses of force on
 6 Atencio were objectively *unreasonable*. Hence, Hanlon and French are not entitled to
 7 summary judgment based on the protection from liability provided by A.R.S. § 13-409
 8 (providing defense of justification if certain conditions are met, including that a
 9 "reasonable person would believe that such force is immediately necessary" (emphasis
 10 added)).²

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 14 **C. Arpaio's Motion to Clarify/Reconsider Ruling Arpaio Can be Responsible in**
 15 **Individual Capacity for Medical Defendants' Conduct (Doc. 448).**

16 Sheriff Arpaio's Motion to Clarify/Reconsider does not seek clarification as to the
 17 Court's Order but instead merely seeks to have the Court reconsider its previous rulings
 18 and repeats arguments made previously by Arpaio. The request for reconsideration will
 19 be denied as untimely. *See* LRCiv 7.2(g)(2) ("[A]ny motion for reconsideration shall be
 20 filed not later than fourteen (14) days after the date of the filing of the Order that is the
 21 subject of the motion").

22 IT IS ORDERED that Plaintiffs' Motion to Certify Appeal as Frivolous (Doc.
 23 454) is granted in part and denied in part. The motion is granted to the extent that
 24 Defendants seek to challenge on appeal the sufficiency of the evidence to support
 25 Plaintiffs' version of the facts and the Court's determination that a genuine issue of fact
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 28 ² To the extent City Defendants seek reconsideration of the Court's denial of
 summary judgment on the state law claim, their request is untimely. *See* LRCiv
 7.2(g)(2).

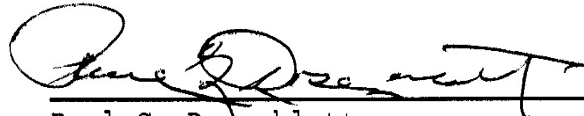
1 exists. The motion is otherwise denied.

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3 IT IS FURTHER ORDERED that City Defendants' Motion to Stay Proceedings
4 Pending Appeal (Doc. 447-1) is granted. The proceedings are stayed pending the
5 outcome of the appeal to the U.S. Court of Appeals for the Ninth Circuit.

6 IT IS FURTHER ORDERED that City Defendants' Request for Clarification as to
7 the State Law Claim Only (Doc. 447-2) is granted to the extent it seeks clarification.
8 Defendants Hanlon and French are not entitled to summary judgment on the state law
9 claims based on A.R.S. § 13-409. To the extent City Defendants seek reconsideration,
10 the request is denied.

11 IT IS FURTHER ORDERED that Sheriff Arpaio's Separate Motion to
12 Clarify/Reconsider Ruling that Arpaio can be Responsible in his Individual Capacity for
13 the Medical Defendants' Conduct (Doc. 448) is denied.

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15 Dated this 14th day of September, 2015.

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20 Paul G. Rosenblatt
21 United States District Judge
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